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THE TRADE, SPORTS AND PROFESSIONAL ASSOCIATIONS COMMITTEE NEWSLETTER

ABA SECTION OF ANTITRUST LAW

American Bar Association Section of Antitrust Law

SPORTS ANTITRUST LITIGATION IN 2008: AN INTERIM OVERVIEW

ROBERT WIERENGA

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This has already been an eventful year in sports antitrust litigation, with professional and amateur sports leagues and associations winning several victories. Those decisions are briefly summarized below.

American Needle: The Sports League As Single Entity

Sports leagues have repeatedly argued, with varying success,[1] that they should be regarded as single entities for purposes of Sherman Act Section 1 and, thus, not subject to Section 1 liability based solely on the adoption or enforcement of league rules or other league activities. In *American Needle, Inc. v. National Football League, et al.*,[2] the Seventh Circuit accepted that argument. In particular, American Needle held that the NFL and its teams should be considered a single entity for purposes of licensing their joint intellectual property.

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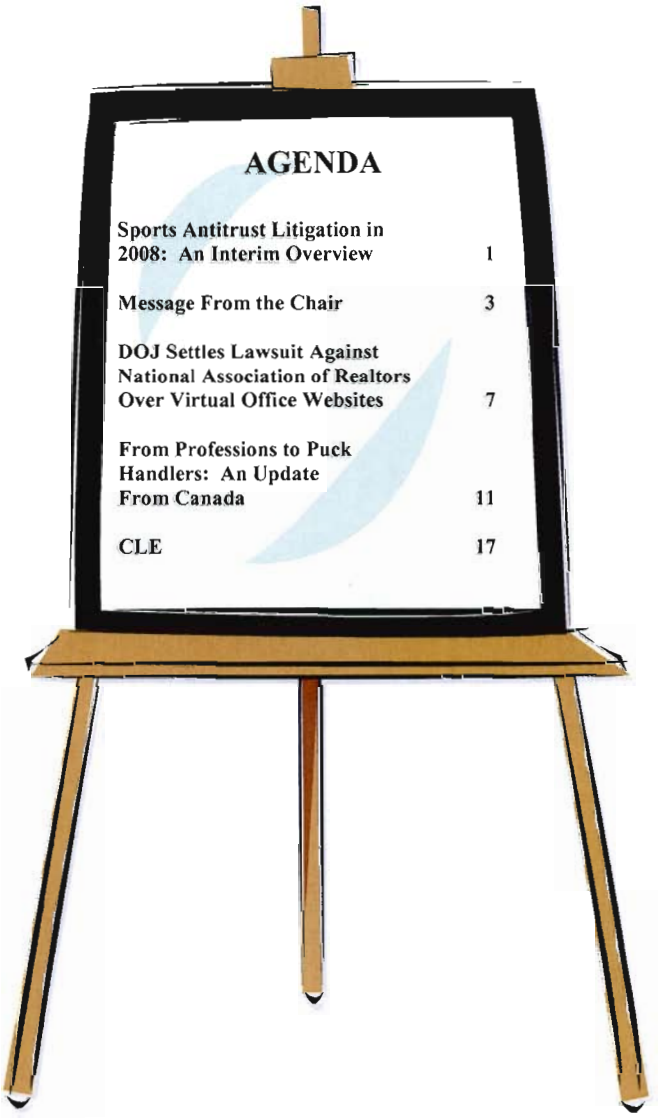

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FROM PROFESSIONS TO PUCK HANDLERS: AN UPDATE FROM CANADA

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There have been several developments in Canada over the last year that are of interest to the Trade, Sports and Professional Associations Committee. These include:

- the release by the Competition Bureau of a draft information bulletin on trade associations;
- the Competition Bureau's publication of its study on self-regulated professions; and
- the Competition Bureau's announcement that it had cleared the National Hockey League of engaging in anti-competitive conduct in connection with the attempt by a prominent Canadian businessman to acquire the Nashville Predators franchise and relocate it to Canada.

A summary of each of these developments is set out below.

1. Draft Information Bulletin on Trade Associations

The Competition Bureau issued a draft information bulletin on trade associations on October 24, 2008 (the "Draft Bulletin").[1] The purpose of the Draft Bulletin is to provide guidance on the potential application of Canadian competition law to the activities of trade associations and to outline suggested best practices that trade associations may adopt in order to minimize the risk of potential violations.

For the most part, the Draft Bulletin does not break new ground. That said, it provides a largely helpful discussion of the potential competition issues facing trade associations and a timely reminder of the need for compliance efforts.[2]

The Draft Bulletin starts with the premise that many of the functions and activities performed by trade associations are beneficial and do not raise competition law issues. However, by their very nature, trade associations carry the risk that they could be used directly or indirectly as vehicles for anti-competitive activity. Accordingly, the Bureau considers it important for trade associations and their members to be aware of the application of Canadian competition law and the potential risks posed by their conduct.

In keeping with this theme, the Draft Bulletin first discusses the provisions of Canada's Competition Act that are most relevant to trade association activities. These include the criminal prohibitions against conspiracies, bid-rigging and price maintenance; certain civil "reviewable practices" (refusals to deal, exclusive dealing, tied selling and abuse of dominance); and misleading advertising.[3]

The Draft Bulletin then elaborates on the various types of trade association-related conduct that pose a greater risk of raising anti-competitive concerns. These include:

- data collection and exchanges of competitively sensitive information;
- membership requirements that artificially restrict entry and thus reduce competition;

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- mandatory fee guidelines;
- codes of conduct;
- restrictions on advertising; and
- standard setting.

The Draft Bulletin also devotes considerable space to the potential issues raised by professional associations or "self-regulating organizations". This is an area of particular interest for the Bureau, as reflected in a separate (and extensive) report which the Bureau issued on the topic in December 2007 (discussed in the next section of this article).

Finally, the Draft Bulletin sets out several recommended "best practices" that trade associations can adopt to minimize potential issues under the *Competition Act*. The first recommendation is that trade associations adopt "credible and effective" competition compliance policies.[4] The Draft Bulletin then lists more specific guidelines that trade associations might wish to incorporate in their compliance policies, most of which are fairly standard and non-controversial (e.g., do not discuss current or future prices at trade association meetings; adhere to clear agendas and record minutes; have membership criteria that are legitimate and applied fairly).

One area where the guidelines require further clarification is with respect to fee schedules used by professional associations. It is quite clear that the Bureau will regard mandatory fee guidelines as a form of unlawful price fixing. The Bureau has recognized, however, that non-coercive, voluntary fee guidelines are lawful, even if the Bureau would prefer that associations not use them. This position is largely reflected in the Draft Bulletin, which provides some suggestions on how voluntary fee guidelines should be structured.[5] However, the Draft Bulletin undercuts this helpful direction by then stating that fee guidelines which conform with the Bureau's recommendations are only "less likely to raise concerns" under the Competition Act. This mixed message creates unnecessary doubt and confusion. It is appropriate, as a matter of competition advocacy, for the Bureau to indicate that it does not like voluntary fee guidelines, even if lawful and structured in accordance with the Bureau's views. It is quite another thing for the Bureau to suggest that, even if parties follow its recommendations, they may still face criminal sanctions.

2. Competition Bureau Issues Report on Self-Regulated Professions

As noted, the Competition Bureau has demonstrated a particular interest in the conduct of self-regulated professions in Canada. The Bureau has devoted attention to this issue because it considers a competitive service sector to be vital for the future health of the Canadian economy. According to Canada's Commissioner of Competition, Sheridan Scott, the Bureau understands that self-regulation of professions plays a legitimate role in protecting consumers and meeting public policy goals. However, the Bureau has noted that Canada's professions are subject to more extensive regulation than their counterparts in other countries, which may hamper the productivity and efficiency of Canadian professionals.[6]

In December 2007, the Bureau released a study that examined the legislation, regulations and codes of practice of five specific professions – accountants, lawyers, optome-

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trists, pharmacists and real estate agents.[7] The objective of the study was to determine whether these professions employ restrictions that limit access to their businesses or control the competitive conduct of their members or related markets.

The Bureau's study disclosed several types of practices/restrictions that it considers troubling (some of which are also addressed in the Draft Bulletin), including:

- advertising regulations, particularly those that restrict comparative advertising;
- mandatory fee guidelines that can inhibit price competition and lead to higher prices, particularly when combined with a prohibition against advertising;
- limits on who can offer certain professional services, which can lead to consumers paying higher prices or paying for more services than they really need; and
- uneven licensing requirements across the country, which can limit the number of professionals and restrict their ability to move where there is demand for their services.

The Bureau has said that it is not proposing to use its study as the basis for enforcement action against the professions at issue, at least at this initial stage. Rather, the Bureau regards its study as part of a broader advocacy campaign to promote the benefits of competition among professions in Canada. The Bureau's objective is to invite responsible bodies – provincial/territorial governments and self-regulating organizations – to consider changing existing practices that may restrict competition. The Bureau also wants responsible bodies to take competition considerations into account whenever formulating and enacting new regulations, rules and policies. That said, the Bureau plans to assess in two years what steps the five specific professions covered by its study have taken to implement its recommendations.[8]

3. Competition Bureau Upholds NHL's Franchise Ownership Transfer and Relocation Policies

On March 31, 2008, the Competition Bureau announced its conclusion that the National Hockey League ("NHL") had not engaged in anti-competitive conduct in connection with the effort by Jim Balsillie of RIM (manufacturers of the "Blackberry") to acquire the Nashville Predators and relocate (some would say "repatriate") the franchise to Canada.

According to the Bureau's news release and accompanying "technical backgrounder", it initiated an inquiry in June 2007 under the Competition Act's abuse of dominance provisions into the NHL's policies regarding ownership transfers and franchise relocations.[9] The Bureau ultimately concluded that there was no evidence that these policies were anti-competitive or that the NHL had improperly interfered with Mr. Balsillie's bid.

The Bureau recognized that restrictions on the relocation of sports franchises imposed by the NHL and other professional sports leagues serve a number of legitimate interests, such as "preserving rivalries between teams, attracting a broader audience, providing new franchises with an opportunity to succeed and encouraging investment in sports facilities and related infrastructure by local municipalities". The Bureau found

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that, as a general matter, the NHL's restrictions were instituted in furtherance of these legitimate objectives and do not constitute a practice of anti-competitive acts. The Bureau emphasized in this regard that any decision to halt a relocation requires a majority vote of NHL clubs, meaning that no single team can exercise a veto to prevent a franchise from relocating. On the other hand, the Bureau said that it might have concerns if a single club could prevent a franchise from moving to Canada, subject to the specific circumstances.

Focusing on Mr. Balsillie's attempted acquisition of the Predators specifically, the Bureau stated that it did not find any evidence that the NHL or its representatives had interfered with or obstructed the sale. Although the NHL did not support the relocation of the Nashville franchise, this was in furtherance of its legitimate interest in ensuring the success of the franchise.

The Bureau's investigation touched upon a very sensitive issue for Canadian hockey fans.

The NHL has tried over the past few decades to extend its footprint to non-traditional hockey cities in the United States, including Nashville and other southern centers. The results have been mixed, to say the least.

Many Canadian hockey fans resent the fact that there are teams in U.S. cities which have no history of supporting hockey, while additional Canadian cities are unable to obtain franchises. In particular, there have been a variety of efforts to try to secure another franchise for southern Ontario – specifically the city of Hamilton – given the population base and that the area is considered to be a "hotbed" for hockey.

One of the perceived stumbling blocks is that there are two existing franchises whose "territories" currently are adjacent to or overlap with Hamilton – the Buffalo Sabres and the Toronto Maple Leafs.[10]

Mr. Balsillie emerged on the scene as a champion for Canadian hockey fans. Though never completely explicit about his intentions, it seemed apparent that his ultimate plan was to buy the troubled Nashville franchise (a good team but with comparatively weak fan support) and move them to Hamilton or his home town of Kitchener, Ontario. Mr. Balsillie had previously tried to buy another troubled franchise without success on that occasion either.[11]

The Bureau's decision is no doubt correct as a matter of competition law, in that it recognizes that associations should have the right to govern their own affairs, including who will be members, provided that the limitations are "properly circumscribed" and serve legitimate interests, which the Bureau found was the case "in the present circumstances". The Bureau's approach is also consistent with other jurisdictions, such as the United States, where reasonable restrictions on franchise relocations have been upheld. That said, the decision did not make the Bureau any friends among Canadian hockey fans.[12]

END NOTES:

1. *See* Competition Bureau News Release, "Competition Bureau Seeks Comments on Draft Trade Associations Bulletin" (October

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24, 2008), http://www.competitionbureau.gc.ca. The Draft Bulletin was actually ready for release on September 8, 2008, but was held up due to a ban on federal initiatives during the recent election campaign. Comments on the Draft Bulletin are due by January 23, 2009.

2. For example, the conduct of participants at a trade association meeting has formed an integral part of the Bureau's allegations of anti-competitive conduct in the chocolate confectionary industry.

3. The *Competition Act* creates both criminal offences and civil "reviewable practices". The criminal offences (such as conspiracies and bid-rigging) are prosecuted in the criminal courts and can lead to liability in the form of fines and imprisonment. The "reviewable practices" (such as exclusive dealing and abuse of dominance) are adjudicated by the Competition Tribunal and can result in injunctive-type orders but not criminal sanctions. Misleading advertising is a unique hybrid in that it can be dealt with in either criminal or civil proceedings, depending upon the gravity of the infraction.

4. The same recommendation is contained in the Bureau's newly revised information bulletin on competition compliance programs, which was also released on October 24, 2008. *See* Competition Bureau News Release, "Competition Bureau Publishes Updated Bulletin on Corporate Compliance Programs" (October 24, 2008), http://www.competitionbureau.gc.ca.

5. For example, the Draft Bulletin states that voluntary fee guidelines, apart from being non-coercive, should be prepared in a "systematic and scientific fashion"; be based on data compiled by an independent third party; ask members what fees they have charged rather than what fees they consider desirable; use a pre-determined response rate; and independently verify a sub-sample of responses.

6. Sheridan Scott, Commissioner of Competition, "Toward Greater Competition in the Self-Regulated Professions: A Win for Consumers and the Economy" (December 11, 2007), http://www.competitionbureau.gc.ca.

7. The Bureau's news release, "Backgrounder" and a copy of the study, Self-regulated professions: Balancing competition and regulation, are available on the Bureau's website at http://www.competitionbureau.gc.ca.

8. The Bureau also has indicated that it intends to undertake similar studies of additional self-regulated professions in the coming years. For example, on March 7, 2008, the Bureau announced that it would be embarking on a "national study" of the practice of dentistry in Canada. Competition Bureau, News Release, "Competition Bureau Launches Study into Dentistry Profession" (March 7, 2008), http://www.competitionbureau.gc.ca.

9. Competition Bureau, News Release, "Competition Bureau Concludes Examination into National Hockey League Franchise Ownership Transfer and Relocation Policies" (March 31, 2008), http://www.competitionbureau.gc.ca.

10. The latter club is an especially storied franchise and the richest in the league, the hockey equivalent of the New York Yankees, except they have not won a championship in over 40 years (perhaps the Chicago Cubs are a better analogy).

11. In an ironic postscript, one of the investors promoted by the NHL as an alternative to Balsillie, William "Boots" Del Biaggio III, has filed for bankruptcy and been accused of defrauding millions of dollars in loans. It is also alleged that he was allowed to bypass some of the NHL's background checks in order to facilitate his investment in the

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Predators.

12. In another hockey-related competition case, a disgruntled fan of the Ottawa Senators hockey team alleged that the club had engaged in an unlawful tying arrangement by requiring that ticket purchasers buy tickets to undesirable games in order to obtain tickets for games that they want to see. The Bureau refused to investigate the case on the grounds that the Senators' practice was a legitimate marketing tool and had no discernible anti-competitive effect. The Competition Tribunal subsequently denied the fan's request to bring an application on his own, citing a lack of evidence to support his claim. *See John Guy Annable v. Capital Sports & Entertainment Inc.*, CT-2008-002, http://www.ct-tc.gc.ca.